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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

VICKI BUTLER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Home Depot's petition for certiorari raised two issues on which the lower courts are in conflict: (1) whether the Seventh Amendment permits a court to certify a class action by subdividing liability issues between a "common issues" jury and numerous "follow-up" juries, and (2) whether Rule 23(b)(2) or the Due Process Clause permits the certification of claims for monetary relief without providing class members an opportunity to opt out of the class. Respondents suggest a number of procedural reasons why this Court should decline to consider the Seventh Amendment issues. These same objections, however, were raised and rejected by the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294-95 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995). Accordingly, rather than providing a reason to deny Home Depot's petition, respondents' arguments demonstrate that the Circuits are split not only on the merits of the Seventh Amendment issue, but also as to whether it should be addressed on mandamus. Respondents' procedural objections to the second question are wide of the mark. This case also involves the same issue as *Adams v. Robertson*, No. 95-1873, but in a superior posture.

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THESE ISSUES.

Respondents contend that the fact that this case comes to the Court in a mandamus posture is a sufficient reason to deny Home Depot's petition. As respondents would have it, the Court need not even consider whether to address the important Seventh Amendment issues raised by the petition that would otherwise merit plenary review. There is no support in the law for respondents' rigid view. As Home Depot explained in its petition, although there are many areas of the law in which this posture would counsel hesitation, the judicial nullification of

jury trial rights under the Seventh Amendment in the class action context is emphatically not one of them.

Respondents' complaints about the appropriateness of mandamus as a vehicle for correcting a class certification order bifurcating a class action for trial were raised and rejected in *Rhone-Poulenc*. As the Seventh Circuit concluded, the vindication of Seventh Amendment rights is "a traditional office of the writ of mandamus," and as a practical matter, if these issues are not addressed at an interlocutory stage, they will not be addressed at all. 51 F.3d at 1298, 1303. Accordingly, when a class certification order improperly imperils a defendant's Seventh Amendment right to a jury trial, the "extraordinary remedy" of mandamus is appropriate and indeed essential. *Id.* at 1294-95.[1]

Respondents' principal response to the Seventh Circuit's conclusion is that considering such issues on mandamus will lead to the routine use of mandamus to review class certification orders in contravention of this Court's holding in *Coopers & Lybrand v. Westinghouse Broadcasting Co.*, 437 U.S. 463 (1978).[2] The Seventh Circuit anticipated and answered this concern as well, noting that even orders which are nonappealable under *Coopers & Lybrand* are reviewable on mandamus in "extraordinary cases" if the challenged order inflicts irreparable harm and "so far exceed[s] the proper

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[1] This Court has also recognized that mandamus is a proper means "of policing compliance with the procedural rules" in civil cases. *Will v. United States*, 389 U.S. 90, 100 n.10 (1967);

[2] Apparently unwilling to take on Home Depot's actual position, respondents have insisted on exaggerating and distorting it. Home Depot is not suggesting that "mandamus should be routinely available to defendants challenging class certification orders." Opp. 10. To the contrary, Home Depot has followed the Seventh Circuit in arguing that mandamus should be available to review certification orders only in limited circumstances. Respondents' alarmist rhetoric about undermining *Coopers & Lybrand* is applicable only to the straw man they have created, not to the position of either petitioner or the Seventh Circuit.

bounds of judicial discretion as to be legitimately considered usurpative in character." 51 F.3d at 1294-95 (citing *Kerr v. United States*, 426 U.S. 394, 403 (1976)).

The Seventh Circuit cautioned that mandamus is not an end run to seek interlocutory review of every certification order. Nonetheless, the court held that mandamus is warranted to overturn class certification orders in the narrow circumstances where: (i) a lower court certifies an otherwise uncertifiable class action by ignoring the dictates of the Seventh Amendment, *id.* at 1303; and (ii) where the improper certification order will eliminate any possibility for later appellate review because the hydraulic pressures of this ingenious procedural vise will force defendants to settle regardless of the merits of the case. *Id.* at 1298

Home Depot is identically situated. The District Court in this case certified an enormous class action -- with potential liability reaching many billions of dollars -- only by subdividing liability issues without regard to Home Depot's Seventh Amendment rights. As explained in *Rhone-Poulenc*, courts cannot stand idly by in these circumstances.[3]

In sum, respondents' position with respect to mandamus is flatly inconsistent with the Seventh Circuit's view in *Rhone-Poulenc*. That is perhaps not surprising, as one of respondents' law firms filed the petition for certiorari in *Rhone-Poulenc*, which focused on the mandamus issue. Far from demonstrating that the petition does not raise an issue worthy of plenary review, at best respondents have demonstrated an additional issue on which the Circuits are split -- the proper standard for mandamus review of class certification orders implicating

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[3] Respondents counter that this Court has expressed a preference for settlement, particularly in the Title VII context, citing *Carson v. American Brands Inc.*, 450 U.S. 79, 88 n.14 (1981). But a preference for settlement should not be distorted to sanction what Judge Friendly described as legalized "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). This Court has never valued settlement as an end in itself, without regard to whether the settlement reflects the underlying merits of the legal dispute.

Seventh Amendment issues. Home Depot raises precisely the same claim that was addressed in *Rhone-Poulenc*, and thus would have been entitled to the requested relief in the Seventh Circuit, though apparently not in the Ninth. If the Court believes that there is anything to respondents' position with respect to mandamus, Home Depot would have no objection to expanding the questions presented to include a question expressly addressing the proper mandamus standard.[4]

II. THE CLASS CERTIFICATION ORDER VIOLATES HOME DEPOT'S SEVENTH AMENDMENT RIGHTS AND IS RIPE FOR REVIEW.

Home Depot clearly explained in its original petition how the class certification order here will require many separate "follow-up" juries to reconsider issues already decided by the class jury in the first phase of this litigation. *See* Pet. 9-14. In particular, Home Depot explained how the burden-shifting regime clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), made it inevitable that follow-up juries would need to reconsider issues first addressed by the common-issues jury. Respondents attempt to disguise the radical nature of the District Court's order by describing it with familiar terms like "bifurcation," "liability phase," and "damages phase." But the

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[4] Although respondents acknowledge that this Court has granted certiorari to consider Seventh Amendment questions raised in a mandamus petition, *see, e.g.*, *Dairy Queen v. Wood*, 369 U.S. 469, 472 (1962), they attempt to dismiss these precedents by arguing, in effect, that not all Seventh Amendment rights are created equal. Opp. 13. In particular, respondents note that the Second and Sixth Circuits have held that the Seventh Amendment issues raised by bifurcation orders are not appropriate for judicial review. *Id.* The Seventh Circuit clearly took a different view in *Rhone-Poulenc*, and so, once again, rather than providing an argument against plenary review, respondents at best have identified another question on which certiorari should be granted.

procedural hydra created by the District Court is a far cry from the "traditional practice of bifurcating liability and damages issues." Opp. 4. Indeed, the District Court's procedure directly contravenes Home Depot's jury trial rights under the Seventh Amendment and this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

Respondents make three unpersuasive efforts to deflect these points. First, respondents point to cases in which courts have certified Title VII actions for class treatment in bifurcated proceedings. Opp. 15-17 & n.7. The ready answer is that all of these cases were decided prior to the 1991 Amendments to the Civil Rights Act of 1964, which created a jury trial right for the first time in such cases. In short, respondents simply repeat the District Court's error. By focusing exclusively on *pre-1991* cases, respondents completely ignore the danger that Title VII bifurcation orders pose to the Seventh Amendment.

Second, respondents also make the inexplicable and indefensible claim that different legal standards apply in Title VII class action cases than in individual Title VII cases. Opp. 19-21. In particular, respondents rely on *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), to argue that this Court's burden-shifting framework in Title VII cases works differently in individual lawsuits than it does in class action cases. *Id.* This misguided argument badly distorts established Title VII law.

This Court in *Teamsters* simply created an alternative to the *McDonnell-Douglas* framework for an individual to establish a prima facie case of discrimination. 431 U.S. at 358. Once a pattern or practice of discrimination is established under *Teamsters*, the burden shifts to the employer to rebut the presumption of discrimination toward each individual class member. *Id.* at 362. Nothing in *Teamsters* purports to prescribe the framework for such rebuttal, which was established in *St. Mary's*, 509 U.S. at 506-07. As explained previously, the application of *St. Mary's* "requires follow-up juries to consider the totality of the circumstances in order to make the ultimate determination whether there was intentional

discrimination" against each individual class member, Pet. 12, which will violate Home Depot's Seventh Amendment rights.[5]

Finally, respondents try to avoid these issues altogether by claiming that the District Court's order certifying the class in this case and ordering a bifurcated trial is somehow "preliminary" and thus the Seventh Amendment claim is not ripe. First and most fundamentally, this ripeness objection was raised and rejected in *Rhone-Poulenc* and in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). The ripeness question is simply part and parcel of the circuit split that Home Depot has asked the Court to review.

In addition, respondents' claim that this case is premature because "the district court has not yet certified the damages phase of the trial, or determined whether the same jury or different juries will hear the damages phase," Opp. 9, is belied by the terms of the District Court's order. The District Court in this case granted "the plaintiff's motion for class certification" *with respect to the entire case*. Pet. App. 11a. It then "further order[ed] that this litigation be bifurcated into separate phases." *Id.* at 12a. If, as respondents assert, the court had "not yet certified the damages phase," it presumably would have bifurcated the trial first and certified the class only as to the first phase. This is not what happened.

What is more, there is no question that -- whatever precise form the second phase of this litigation takes -- it will have to utilize multiple juries. The class certified in this case comprises more than 217,000 present and former female employees of Home Depot and rejected female applicants. Respondents cannot argue in good faith that there is *any* chance that a single

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[5] If (contrary to fact) respondents were correct, and the substantive law of Title VII did vary depending on whether it was applied in an individual suit or a class action, that result would plainly violate the Rules Enabling Act, 28 U.S.C. § 2072, for the Rules of Civil Procedure promulgated by this Court cannot be interpreted so as to modify substantive law enacted by Congress. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990); *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974).

jury will be empaneled to hear and decide the individual damage claims of each and every one of these class members.

In sum, there is nothing "hypothetical" about the procedure that has been dictated by the District Court's orders in this case. The District Court's order makes it crystal clear that different juries inevitably will consider overlapping issues of liability in direct violation of the Seventh Amendment. There is nothing premature about this constitutional violation and nothing to be gained from delaying plenary review.

III. THE CIRCUITS ARE CLEARLY SPLIT OVER WHETHER A BIFURCATED CLASS ACTION VIOLATES A DEFENDANT'S SEVENTH AMENDMENT RIGHTS.

Respondents make a feeble attempt to dismiss the existing split of authority on the Seventh Amendment issue on the ground that the decisions of the other Courts of Appeals on this issue were not rendered in Title VII cases. This is a classic distinction without a difference. As Home Depot has already outlined in detail, there is a clear split of authority on whether the Seventh Amendment permits class certification where separate "follow-up" juries will be required to reconsider issues already decided by a single "common issues" jury. *See* Pet. 14-21 (discussing cases). As petitioners have already outlined in detail, the First, Fifth and Seventh Circuits have concluded that this Court's opinion in *Gasoline Products* holds that the Seventh Amendment does not permit such a certification. In contrast, the Third, Fourth, Sixth and Ninth Circuits have dismissed the Seventh Circuit's *Rhone-Poulenc* decision, and its progeny, holding instead that the efficiencies gained by certifying these class actions are manifold, while downplaying the Seventh Amendment interests outlined in *Gasoline Products*. *See also In re Copley Pharm., Inc.*, 161 F.R.D. 456, 462 (D. Wyo. 1995) (recognizing the split). The fact that most of the prior cases involved the application of Rule 23 in a mass tort context does not make the split any less real.

There is nothing in these opinions that limits the reasoning or holdings to the "mass tort" context, nor do respondents offer any compelling reason why they should be so limited.[6] Respondents' allegation that the "claims, defenses and evidence" are different in mass tort cases and Title VII cases is inconsequential, as the same is true even within the "mass tort" context. Defenses available in a cigarette case (such as assumption of the risk) might not be available in an asbestos case. Yet even Respondents do not contend that no split exists, for example, between *Castano* and *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

What is at issue in all of these cases -- including this case -- is whether the "common issues" decided by the jury in the first phase can be "severed" from those issues that must be decided by separate "follow-up" juries in the second phase. As Home Depot has demonstrated, these issues cannot be "carved at the joint" in Title VII cases any more than in other kinds of tort cases. *Rhone-Poulenc*, 51 F.3d at 1302.

IV. THIS PETITION SHOULD -- AT A MINIMUM -- BE HELD PENDING THE COURT'S DECISION IN *ADAMS V. ROBERTSON*, NO. 95-1873.

Home Depot also challenged the District Court's decision to certify a class seeking primarily monetary relief under Rule 23(b)(2). Home Depot maintains that certification of such a class under 23(b)(2), which does not permit class members to opt out of the suit, violates either Rule 23 or the due process rights of objecting class members. Home Depot noted in its petition that the Court is currently considering this constitutional issue in *Adams v. Robertson*, 676 So.2d 1265

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[6] In fact, both *Rhone-Poulenc* and *Castano* relied heavily on previous Fifth Circuit decisions rendered in the antitrust context, *see, e.g.*, *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978), while the Ninth Circuit's decision in *Arthur Young & Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), was a securities case.

(Ala. 1995), *cert. granted,* 117 S.Ct. 37 (1996), and noted that this case, unlike *Adams* or the first case raising the issue, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (*per curiam*) (dismissing petition as improvidently granted), presents both the Rule 23 issue and the constitutional question. As a consequence, Home Depot suggested that the Court could substitute this petition for *Adams*, decide the two cases together, or, at a minimum, hold this case until *Adams* is decided.

Respondents oppose these suggestions with three claims: (1) that Home Depot did not raise the due process issue below, (2) that it lacks standing to raise this claim, and (3) that *Adams*, is unrelated to this case. Opp. 25-27.

Once again, Respondents strike out. In the first place, Home Depot raised due process concerns below. Home Depot's Brief in Opposition to Class Certification at 18 (Filed May 26, 1995). In addition, Home Depot clearly had standing to raise this claim under *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985). Contrary to respondents' suggestion, Home Depot is in the same position and has the same interest as the petitioner in *Shutts* -- namely to ensure that, assuming *arguendo* that certification is appropriate, all class members are bound by the judgment. This Court held in *Shutts* that the defendant had standing to raise the due process issue because "it would be obviously and immediately injured" if the class action did not bind all class members. 472 U.S. at 805.

Respondent's third claim is that *Adams* is inapplicable to this case because of the possibility that the District Court will eventually certify some of the damage issues under Rule 23(b)(3), which provides for an opt-out right. In that event, respondents reason, all class members will have the right to opt out and pursue their individual damage claims. The problem with this argument is that it assumes that respondents will win at the first phase. If, however, the District Court exonerates Home Depot in the common-issues trial, the damage claims of

the individual class members will be extinguished, even though they never had a right to opt out.[7]

Finally, respondents propose a new rule of Supreme Court practice -- that petitions in an interlocutory posture are somehow ineligible to be held pending resolution of another petition. Respondents offer no support for this novel proposal. If this Court resolves the *Adams* case, then that decision will no doubt provide substantial guidance to the lower courts on remand. On the other hand, should the Court identify a procedural problem with the *Adams* case or fail to reach a decision for some other reason, this petition could provide an alternative vehicle. *See, e.g.*, *Plaut v. Spendthrift Farms*, 115 S.Ct. 1447 (1995). For these reasons, the Court should, at a minimum, hold this case pending the outcome of *Adams*.

CONCLUSION

For these reasons, as well as those stated in the petition, a writ of certiorari should be granted or, in the alternative, this petition should be held pending the Court's resolution of *Adams v. Robertson*, No. 95-1873.

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[7] This is perhaps most obvious with respect to punitive damages. The District Court's order provides that in the first phase the jury will determine "whether defendant is liable for punitive damages." App. 12a. If the "common issues" jury finds that Home Depot is not liable for punitive damages, then class members will lose those claims before they can exercise an opt-out right.

Respectfully submitted,

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